

Mark A. Knueve (admitted *pro hac vice*)  
Daniel J. Clark (admitted *pro hac vice*)  
Adam J. Rocco (admitted *pro hac vice*)  
VORYS, SATTER, SEYMOUR and PEASE LLP  
52 East Gay Street, P.O. Box 1008  
Columbus, Ohio 43216-1008  
Phone: 614.464.6436  
Fax: 614.464.8054  
Email: maknueve@vorys.com  
djclark@vorys.com  
ajrocco@vorys.com

Yvette Davis, State Bar No. 165777  
HAIGHT, BROWN & BONESTEEL LLP  
2050 Main Street, Suite 600  
Irvine, CA 92614  
Phone: 714.426.4607  
Fax: 714.754.0826  
Email: ydavis@hbblaw.com

*Attorneys for Defendants Big Lots Stores, Inc. and PNS Stores, Inc.*

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

VIOLA HUBBS, BRANDON COLEMAN, TAMIKA WILLIAMS,  
individually and on behalf of other  
members of the general public  
similarly situated,

## Plaintiffs,

vs.

BIG LOTS STORES, INC., an Ohio corporation; PNS STORES, INC., an Ohio corporation; and DOES 1 through 10, inclusive.

### Defendants.

Case No.: 2:15-cv-01601-JAK-ASx

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
RECONSIDERATION**

## Honorable: John A. Kronstadt

Date: September 24, 2018

Time: 8:30 A.M.

Ctrm: 10B

Pretrial Conference: October 29, 2018  
Trial: November 13, 2018

1   **I. INTRODUCTION**

2       Although the *Troester* Court held that California had not adopted the federal  
 3 de minimis standard,<sup>1</sup> the Court acknowledged that a de minimis defense may  
 4 nonetheless exist under California law. The Court declined to provide a standard for  
 5 such a California de minimis defense, holding only that the defense was not  
 6 available under the facts of the case before it. *Troester* thus does not require this  
 7 Court to reconsider its summary judgment decisions in this case because the facts of  
 8 this case are distinguishable from the *Troester* facts in every material respect. Since  
 9 *Troester* was limited to its facts, it does not apply here.

10      Additionally, the Court should not reconsider its decision on Plaintiffs’  
 11 derivative penalty claims, which require Plaintiffs to prove that Defendants acted  
 12 willfully or intentionally. There is obviously no legitimate basis for Plaintiffs to  
 13 argue willfulness or intentional conduct here.

14   **II. ARGUMENT**

15      **A. The *Troester* Court limited its decision to the facts of that case.**

16       Although the *Troester* Court held that “California’s wage and hour statutes  
 17 [and] regulations [had not] adopted the de minimis doctrine found in the federal Fair  
 18 Labor Standards Act,” the Court “decline[d] to decide whether a de minimis  
 19 principle may ever apply to wage and hour claims given the wide range of scenarios  
 20 in which this issue arises.” *Troester v. Starbucks Corp.*, 2018 Cal. LEXIS 5312, at  
 21 \*3, 20 (July 26, 2018). Instead, the Court decided “only whether the de minimis rule  
 22 is applicable to the facts of this case as described by the Ninth Circuit,” and  
 23 determined that the defense was not available under those facts. *Id.* at 21.

24       In short, *Troester* limited its holding to the facts before it. As set forth below,  
 25 the facts here are materially distinguishable from the facts in *Troester*. As a result,  
 26 the Court should not reconsider and reverse its prior decisions in this case.

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27      <sup>1</sup> Under the federal standard, daily amounts of up to ten minutes can be de minimis.

1           **B. The facts here are distinguishable from the facts in *Troester*.**

2           *Troester* involved a single management-level employee, Douglas Troester.  
 3 The *Troester* Court analyzed the tasks performed by Troester “off the clock,” the  
 4 regularity of the work, the amount of “off the clock” time per shift, and the  
 5 aggregate amount of “off the clock” time across Troester’s employment. In every  
 6 material respect, the *Troester* facts are distinguishable from the facts present here.

7           With regard to the tasks performed by Troester, the Court stated as follows:

8           Troester submitted evidence that during the alleged class  
 9 period, Starbucks’ computer software required him to  
 10 clock out on every closing shift before initiating the  
 11 software’s “close store procedure” on a separate computer  
 12 terminal in the back office. The close store procedure  
 13 transmitted daily sales, profit and loss, and store inventory  
 14 to Starbuck’s corporate headquarters. After Troester  
 15 completed this task, he activated the alarm, exited the  
 16 store, and locked the front door. Troester also submitted  
 17 evidence that he walked his coworkers to their cars in  
 18 compliance with Starbuck’s policy. In addition, Troester  
 19 submitted evidence that he occasionally reopened the store  
 20 to allow employees to retrieve items they left behind,  
 21 waited with employees for their rides to arrive, or brought  
 22 in store patio furniture mistakenly left outside.

23           *Troester*, at \*4-5. Significantly, Starbucks and Troester stipulated that all of these  
 24 tasks were compensable. *Id* at \*21.

25           Here, in contrast, after clock out, the manager on duty only had to set the  
 26 alarm and lock the front door.<sup>2</sup> ECF 287 at pp. 5-6. Non-management employees  
 27 had no tasks to perform and simply left after the alarm was set. *Id*. No employee was  
 28 required to initiate a software procedure after clocking out. There is no evidence that  
 any employee was required to walk coworkers to their cars, and no evidence that

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<sup>2</sup> Coleman testified that he occasionally checked employees’ bags after clocking out. Performing this task off the clock violated Company policy. (ECF 83 at 15)

1 any employee was required to reopen the store to retrieve items, wait for rides to  
 2 arrive, or bring in store patio furniture. Moreover, as discussed in more detail below,  
 3 the parties have not stipulated that this time is compensable.

4 With regard to regularity, the *Troester* Court noted that the district court had  
 5 **acknowledged** that “Troester’s store closing activities were regularly occurring”  
 6 and performed “on a daily basis.” *Troester*, at \*6, 21. Here, in contrast, the Court  
 7 found that the evidence was **not** sufficient to show regularity. ECF 287 at p. 11.  
 8 Plaintiff Brandon Coleman “testified that most of the time he did not work the  
 9 closing shift.” ECF 287 at p. 2. The Court also noted that there were declarations  
 10 from Class Members stating that they did not regularly work closing shifts, and that  
 11 the parties’ experts opined that Class Members worked a shift with a “gap”  
 12 somewhere between one in every 5.6 shifts and one in every 20 shifts. *Id.* at 10-11.  
 13 This is obviously materially distinguishable from the “daily” situation in *Troester*.

14 With regard to the amount of time per shift, Troester’s “closing tasks required  
 15 Troester to work four to 10 additional minutes each day.” *Troester* at \*5. Here, the  
 16 Court noted that there was “evidence that Class Members left their stores less than  
 17 two minutes after clocking out, and some Class Members declared that this process  
 18 lasted only a few seconds.”<sup>3</sup> ECF 287 at p. 8. Plaintiff’s expert opined that the  
 19 median “gap” was 2.33 minutes. *Id.* Defendant’s expert opined that the median  
 20 “gap” across the entire class period was 2.35 minutes, and only 1.4 minutes under  
 21 the more accurate Empower time-keeping system. *Id.* at pp. 8-9. Again, the evidence  
 22 here is materially distinguishable from the evidence in *Troester*.

23 Finally, with regard to the aggregate amount of time, the *Troester* Court  
 24 stated: “Over the 17-month period of his employment, Troester’s unpaid time

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25  
 26 <sup>3</sup> Coleman testified that it “took about a minute” to set the alarm, and that depending  
 27 on the number of people on the closing shift he would spend one to five minutes  
 after clocking out. ECF 287 at p. 8.

1 totaled approximately 12 hours and 50 minutes.” *Troester* at \*6. Here, in contrast,  
 2 the Court found that “over a 14-month period, [Coleman’s] total “gap” time was 43  
 3 minutes” — less than one hour. ECF 287 at fn 2. With regard to Class Members,  
 4 Plaintiff’s expert found that the median aggregate amount of time was 26.4 minutes  
 5 (less than an hour), and Defendant’s expert found that the median aggregate amount  
 6 was 6 minutes.<sup>4</sup> *Id.* at 8-9. This is materially distinguishable from the nearly 13  
 7 hours of unpaid time that *Troester* worked.

8 In summary, *Troester* was limited to its facts, which are distinguishable in  
 9 every material respect from the facts in the present case. *Troester* does not require  
 10 this Court to reconsider or reverse its prior decision.<sup>5</sup>

11 **C. This case is distinguishable from *Troester* because the “gap” is not**  
**compensable time.**

12 As discussed above, *Troester* performed a number of tasks after clocking out,  
 13 and the parties in that case stipulated that all of those tasks were compensable.  
 14

15 Here, in contrast, the parties have not stipulated that the “gap” is  
 16 compensable. After clock out, non-management employees perform no tasks. They  
 17 simply gather their belongings, walk to the front of the store, and exit. This time is

18  
 19 <sup>4</sup> Plaintiffs’ expert opined that the mean aggregate “gap” for Class Members was  
 20 143.4 minutes. This is misleading because it excluded employees who did not  
 21 experience a “gap,” and included a few outliers who dramatically drove up the  
 average. Nonetheless, even this inflated number is materially distinguishable from  
 the nearly 13 hours at issue in *Troester*.

22 <sup>5</sup> Plaintiffs also ask the Court to reconsider its decision granting summary judgment  
 23 on Plaintiffs’ individual bag check claim. Those facts are even more distinguishable  
 24 from *Troester*. As this Court found, Coleman almost never had a bag check, and  
 25 spent “little or no time on bag checks … in most shifts.” ECF 118, p. 9. Hubbs  
 26 testified that the process took only “two, three seconds” and that she would  
 sometimes not bring a bag to work, which meant she would not have a bag check.  
*Id.* Bag checks thus did not occur on a “regular” or “daily basis” and the amount of  
 27 time was significantly less than the daily four to ten minutes spent in *Troester*.

1 not compensable. Meanwhile, the only tasks performed by the manager are setting  
 2 the alarm (which takes a few seconds) and locking the door. ECF 287 at p. 6. The  
 3 only arguably compensable tasks—setting the alarm and locking the door—are  
 4 performed by one employee and take a few seconds.

5 A similar circumstance was addressed in *Chavez v. Converse, Inc.*, 2017 U.S.  
 6 Dist. LEXIS 169167, \*24 (N.D. Cal. Oct. 11, 2017), in which the court stated:

7 It does not make sense to compensate employees for time  
 8 spent packing up and walking to the exit because store  
 9 employees pack up and then walk to the exit with or  
 10 without an exit inspection. Indeed, there is no indication  
 11 that an employee could not use the restroom, socialize,  
 12 request a Lyft, or purchase merchandise before undergoing  
 13 the exit inspection. As far as the Court knows, Converse  
 14 does not control its employees or foreclose on their  
 15 activities while they pack up and walk to the exit.

16 Similarly, here, it would not make sense to compensate employees for time  
 17 gathering belongings or walking to the front door.<sup>6</sup>

18 This further distinguishes *Troester* and also underscores the truly de minimis  
 19 nature of the time here. The only “tasks” performed are setting the alarm and  
 20 locking the door, which are performed by the manager only, and which only take  
 21 seconds. By any objective and rationale measure, this is de minimis.

22 **D. The Court should not reconsider its decision on Plaintiffs’ derivative  
penalty claims because Defendants were not willful.**

23 Plaintiffs cannot recover penalties under Code Sections 203, 204,<sup>7</sup> and 226,<sup>8</sup>  
 24 or liquidated damages under Section 1194.2, because there can be no question that

25<sup>6</sup>This is particularly true in those instances when an employee spent more than a  
 26 minute or two between clocking out and setting the alarm. Since it only takes a few  
 27 seconds to set the alarm, there is no reason to believe that any employee would be  
 28 performing “work” during a longer period of time.

<sup>7</sup> Plaintiffs’ claim under Cal. Lab. Code § 204 (Seventh Cause of Action) fails  
 because no private right of action exists under Section 204. *See, e.g., Unger v.*

1 Big Lots did not act willfully or intentionally. Where there is a “good faith dispute”  
 2 in law, the conduct is not willful or intentional, regardless of whether or not there is  
 3 an actual violation.<sup>9</sup> See ECF at 196 at 28-35. “A ‘good faith dispute’ that any  
 4 wages are due occurs when an employer presents a defense, based in law or in fact  
 5 which, if successful, would preclude any recovery on the part of the employee. The  
 6 fact that a defense is ultimately unsuccessful will not preclude a finding that a good  
 7 faith dispute did exist.” *Amaral v. Cintas Corp.* No. 2, 163 Cal. App. 4th 1157, 1201  
 8 (2008). Legal uncertainty as to the merits of a claim provides an employer with a  
 9 presumption of a good faith dispute. *Id.* at 1202 (citing *Armenta v. Osmose, Inc.*,  
 10 135 Cal. App. 4th 314 (2005)); cf. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69-  
 11 70 (2007) (penalties improper where there are multiple, reasonable interpretations of  
 12 law); *Home Depot*, 2017 U.S. Dist. LEXIS 145120, \*10 (summary judgment on  
 13 section 203 and 226 claims where good faith dispute as to whether workday  
 14 designation was improper).

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16

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17 *Fannie Mae*, No. SACV 15-00951-CJC(JCx), 2015 U.S. Dist. LEXIS 93491, at \*6  
 18 (C.D. Cal. July 16, 2015); see also ECF 196 at 33.

19

8 Plaintiffs’ claims under Section 226 fail for the separate reason that Plaintiffs do  
 19 not allege that their wage statements incorrectly reflected the amounts that were  
 20 actually paid; they allege that the wage statements did not include the “gap” time.  
 21 This claim is not actionable under California law. *Maldonado v. Epsilon Plastics,*  
*Inc.*, 22 Cal. App. 5<sup>th</sup> 1308 (2018).

22

9 Section 203 provides for penalties only when an employer “willfully” fails to  
 23 pay wages at the time an employee is terminated. Cal. Lab. Code § 203. Section 226  
 24 provides for penalties only when a plaintiff can establish a “knowing and  
 25 intentional” failure to provide accurate wage statements. See Cal. Lab. Code  
 26 § 226(e). A court may decline to impose liquidated damages under Section 1194.2,  
 27 if an employer shows that (1) it had “reasonable grounds for believing the act or  
 omission” giving rise to the penalties did not violate California law, and (2) the act  
 or omission was in good faith...” Cal. Lab. Code § 1194.2(b).

28

Defendants reasonably believe that Big Lots' closing shift process is legally compliant because any "gap" between the time when an employee clocks out and the time the alarm is set is de minimis. This Court agreed with Defendants (ECF 118 at 9-10; ECF 123 at 8-9; ECF 287), as did numerous other Courts and the DLSE. (ECF 196 at 20-21). Indeed, when certifying the question in *Troester*, the Ninth Circuit stated that two of its panels had previously applied the *de minimis* doctrine to California wage claims in the absence of a determination on the issue by the California Supreme Court. 680 Fed. App'x at 513 (citing *Corbin v. Time Warner Entm't-Advance/Newhouse P'ship*, 821 F.3d 1069, 1083 (9th Cir. 2016); *Gillings v. Time Warner Cable LLC*, 583 Fed. App'x 712 (9th Cir. 2014)). Defendants thus had a good faith belief that the "gap" was de minimis. See *Barnhill v. Robert Saunders & Co.*, 125 Cal. App. 3d 1, 177 Cal. Rptr. 803, 804 (1981) (penalties not appropriate where employer setoff employee debt with wages upon employee's discharge because at time California courts were divided as to when employer had right to "set off" employee's debt). Accordingly, the Court should not reconsider its prior decision granting summary judgment on Plaintiffs' derivative penalty claims.

**E. To the extent the Court reconsiders its summary judgment decisions, it should also reconsider its decision granting class certification.**

In the event the Court reconsiders its decisions granting summary judgment, the Court should also reconsider its decision granting class certification to the Closing Shift class.<sup>10</sup> Determining whether an undefined California de minimis standard applies to each and every class member would involve thousands of individualized inquiries. This is particularly true because the compensability of the "gap" (or a portion of the "gap") would depend on what the class member was doing

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<sup>10</sup> "[A] district court may decertify a class at any time." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009) (internal citations omitted).

during the time. In *Stiller v. Costco Wholesale Corp.*, 298 F.R.D. 611, 628 (S.D. Cal. 2014), the court refused to certify a similar class and stated:

[D]etermining whether the Alleged Policy existed, was enforced on a companywide basis, and operated in a way that resulted in employees being under Costco's control, will only answer the question of whether employees were sometimes detained without pay as a result of the Alleged Policy. ... Costco has offered convincing evidence that not all employees experienced unpaid delay as a result of the Alleged Policy.... And, if it can only be determined on a classwide basis whether the Alleged Policy sometimes resulted in unpaid [off the clock] time, individualized determinations will be required to determine the question of liability. This is because liability hinges on whether employees actually performed [off the clock] work.

9     *Id.* at 624-25 (emphasis original). See also *Koike v. Starbucks Corp.*, 378 Fed.  
10 App’x 659, 661-62 (9th Cir. 2010) (affirming denial of class certification based on  
11 finding that “individualized factual determinations were required to determine  
12 whether class members did in fact engage in OTC work and whether [the employer]  
13 had actual or constructive knowledge of the OTC work performed.”); *Heffelfinger v.*  
14 *Elec. Data Sys. Corp.*, 2013 U.S. Dist. LEXIS 201979 (C.D. Cal. Feb. 26, 2013)  
15 (decertifying class after summary judgment was partially reversed).

16 | III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiffs' Motion for Reconsideration.

VORYS, SATTER, SEYMOUR AND PEASE LLP  
Mark A. Knueve  
Daniel J. Clark  
Adam J. Rocco

HAIGHT, BROWN & BONESTEEL LLP  
Yvette Davis

By: /s/ Mark A. Knueve  
Mark A. Knueve  
Big Lots Stores, Inc. and PNS Stores, Inc.

## CERTIFICATE OF SERVICE

2 The undersigned hereby certifies that on August 27, 2018, the foregoing was  
3 filed with the Clerk of the Court for the United States District Court for the Central  
4 District of California via the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

/s/ Mark A. Knueve  
Mark A. Knueve